

by the fact that respondent provided treatment to her for those complaints. Thus, she contends she has satisfied the statutory notice requirement. Independent of that notification, claimant argues that there was just cause for her delay in reporting her injury and that under K.S.A. 44-520, the filing of her claim in December 2004 satisfies the statutory requirement. .

Respondent argues that the ALJ's decision should be affirmed in all respects.

The issues to be resolved in this appeal are as follows:

1. Whether claimant sustained an accidental injury;
2. Whether claimant's alleged accidental injury arose out of and in the course of her employment; and
3. Whether claimant provided timely notice as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

At the preliminary hearing, claimant testified that she has suffered from bilateral shoulder problems, the right being worse than the left, "off and on" since beginning her job with respondent.² Claimant attributes these complaints to her employment, explaining that the work was hard and she believed she would "get used to it".³ She further testified that she is a "very vocal" employee and that as far back as 2003 she has notified no less than three of her direct supervisors, Mike Damon, Chris Devons and Roy White, of her shoulder complaints. She also indicates she informed a co-worker, Earl, of her complaints.

Claimant has worked for respondent in various capacities over the last 5 years, most recently as a package sorter. During her employment but before September 6, 2004, she sustained no less than 3 accidental injuries, each which she reported to respondent. The first of these injuries occurred in September 2002 and involved the right shoulder and was diagnosed as tendonitis/contusion of the right shoulder.⁴ Treatment, at respondent's direction and expense, for these complaints continued to November 1, 2002. Her treatment was provided by Dr. J.S. Walia, or associates in that same office. Claimant was placed on light duty for a period of time then returned to regular duty. In April 2003, she suffered another injury, a laceration to a finger, and then again in May 2003, she experienced a low back injury. Respondent referred claimant to Dr. Lynn Curtis for

² P.H. Trans. at 7-8.

³ *Id.* at 10.

⁴ *Id.*, Resp. Ex. A (Dr. J.S. Walia's Office note dated 9/11/2002).

treatment. Claimant does not dispute the existence of these accidents, or that she was required by her employer to report any accidents immediately.

The week before September 6, 2004⁵, claimant testified she suffered from the flu and sought treatment from an emergency room. Then, on Monday, September 6, 2004, claimant testified that she returned to work even though she was still suffering from the after effects of the flu. Claimant says that she told her employer before she went to work that she was not at 100 percent. Nonetheless, claimant appeared for work. She testified that she was unable to lift packages and required help to do her work.

The next day claimant testified her hands were swollen and that her shoulders and arms were too stiff to move. She called in to work and informed her supervisor she had no idea “what was wrong” but that she was going to the doctor and would be unable to work that day.⁶

Claimant sought treatment from Dr. Diana L. Carver who was in the same office as Dr. Curtis, on September 8, 2004. Claimant reported experiencing swelling and pain in her hands and arms. The records from these physicians indicate no specific connection between the claimant’s complaints and her work activities.

Claimant was taken off work on September 7, 2004, and released to return to work on December 9, 2004. During this time, claimant suffered from continued swelling in her hands and her whole body along with pain in both shoulders. According to claimant, the pain in her right shoulder is in the same place as that which she experienced in 2003.

After being released to return to work, claimant filed this claim with the Division of Workers Compensation on December 13, 2004.

At her lawyer’s request, claimant was seen and evaluated by Dr. Daniel Zimmerman. According to Dr. Zimmerman, claimant suffers from pain, weakness and restricted motion in her right shoulder. Dr. Zimmerman’s initial report indicated claimant’s right shoulder condition is not fully elucidated, but he issued a subsequent report, admitted into evidence after the conclusion of the preliminary hearing, indicating claimant was suffering from work-related impingement syndrome.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of

⁵ During cross examination at the preliminary hearing, claimant conceded that respondent’s business was closed on September 6, 2004, as it was Labor Day. Thus, it would appear that claimant is more likely than not referring to Tuesday, September 7, 2004 as the day she first returned to work.

⁶ P.H. Trans at 25.

compensation and to prove the various conditions on which his or her right depends.⁷ A claimant must establish that his personal injury was caused by an “accident arising out of and in the course of employment.”⁸ The phrase “arising out of” employment requires some causal connection between the injury and the employment.⁹ The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.¹⁰

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹¹

After hearing the evidence, the ALJ denied claimant’s request for preliminary hearing benefits. He was not persuaded that claimant proved the essential elements of her claim. Specifically, he concluded she had failed to meet her burden of establishing an accidental injury which arose out of and in the course of her employment, and that she failed to establish timely notice. The Board agrees with those findings and sees nothing within the evidence or in claimant’s brief that would justify a contrary finding.

Claimant admittedly suffered from the flu the week before September 7, 2004. When she returned to work she was still suffering from pain and ultimately swelling in her entire body, particularly the shoulders and hands. Although the claimant suggests “the [r]espondent and the Administrative Law Judge have attempted to blur the issue with [c]laimant’s flu related inflammatory joint problems”¹² the Board disagrees.

Claimant had a work-related shoulder injury in 2002, and that treatment was completed in November 2002. She had subsequent work-related injuries which required treatment in 2003 and 2004. Her last medical visit (before the instant alleged accident) was March 8, 2004 and involved neck complaints. At no time did claimant complain of ongoing bilateral shoulder problems during any of these subsequent office visits in 2003 and 2004. Claimant knew of the appropriate procedure to initiate a claim should she suffer

⁷ K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁸ K.S.A. 44-501(a).

⁹ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

¹⁰ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

¹¹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

¹² Claimant’s Brief at 8 (filed Mar. 18, 2005).

from a work-related accidental injury. Both Mike Damon and Chris Devons contradict claimant's testimony that she told them of the work-related nature of her shoulder complaints at any time before claimant filed this claim.

The physicians who have been treating claimant have not expressed any opinion indicating claimant's work bears any relationship to her ongoing complaints. Only Dr. Zimmerman, who saw claimant one time and initially offered no definitive diagnosis and only belatedly suggested she suffers from impingement syndrome which is work related. That suggestion is unpersuasive in light of the sequence of events, the nature of claimant's present complaints and the treating physician's records.

Like the ALJ, the Board is unpersuaded that claimant suffered any sort of repetitive accidental injury which culminated on September 7, 2004, her last date of work before filing this claim. Similarly, the Board is equally unpersuaded that claimant failed to establish a causal connection between her bilateral shoulder complaints and her work activities. These findings are, therefore, affirmed.

Finally, independent of the foregoing, the Board also finds the claimant failed to give timely notice. K.S.A. 44-520 provides as follows:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Here, claimant testified that she doesn't remember when she first gave notice of her alleged series of repetitive injuries, only that she clearly knew that work was causing her upper extremity problems.¹³ While she testified that she was very vocal and repeatedly told her supervisors of her ongoing complaints, that fact is disputed by two of those individuals. Claimant's contention that respondent "knew" of her shoulder complaints since 2003 when

¹³ P.H. Trans. at 7.

she was sent to a physician is not supported by the medical records, nor do any of the supervisors confirm claimant's contention that she was unable to keep up with the work flow on September 7, 2004. Moreover, claimant's own testimony indicates that when she called into work the day following her last date of work, she merely informed her supervisor that she was feeling poorly and needed to go to the doctor. There was no testimony that she related her complaints to her work activities. Under these facts the Board finds claimant failed to give notice within 10 days and there is no just cause to extend the notice period to 75 days. Accordingly, the Board affirms the ALJ's finding that claimant failed to give timely notice under K.S.A. 44-520.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.¹⁴

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated February 23, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹⁴ K.S.A. 44-534a(a)(2).